Supreme Court, U.S.
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No. 09-1308

In The Supreme Court of the United States

MARTIN MARIETTA MATERIALS, INC.
and HUNT MARTIN MATERIALS, LLC,

Petitioners,

v.

CITY OF GREENWOOD, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The jury in this case (which petitioners refer to as *Greenwood I*) awarded compensatory and punitive damages for public nuisance at the conclusion of a trial conducted in March 2008. Several months later, the federal district court in the parallel litigation between the parties (which petitioners refer to as *Martin Marietta I*) refused to grant full faith and credit to issues determined adversely to petitioners in state court and conducted a bench trial on liability and a jury trial on damages. The district court entered its order on the issues decided at the bench trial in September 2008 (Pet. 46a). Petitioners here seek review of the state-court ruling, and the questions presented are, therefore, as follows:

I.

A. Are petitioners entitled to review by this Court of a federal constitutional issue that was not properly presented to the state courts and was not addressed in the opinion of the state appellate court?

B. If so, does an award of punitive damages in state court on a nuisance claim arising from the effects of truck traffic passing through a small city present a compelling reason for the exercise of certiorari review where the defendants (petitioners here) subsequently obtained a judgment of a federal district court, based in part on evidence that was neither offered nor admitted in evidence in state

QUESTIONS PRESENTED – Continued

court, that the city could not prohibit the truck traffic?

II.

A. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review a state court's application of a federal procedural rule?

B. If so, does a state court's refusal to require the dismissal of claims in a case that is adjudicated before the federal action in which those claims purportedly should have been asserted as counter-claims represent an important question of federal law justifying this Court's grant of a writ of certiorari?

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REASONS FOR DENYING THE PETITION

Neither of the Questions Presented in this case is properly before this Court. Even if they were, however, petitioners have failed to demonstrate the "compelling reasons" necessary to justify certiorari review. S. Ct. R. 10.

Petitioners' argument that they have been punished for lawful conduct, in violation of the Due Process Clause, was neither properly presented to nor passed upon by the Missouri courts. Because the Missouri Court of Appeals did not address the due process issue, petitioners must overcome a presumption that they failed to properly present it below. They cannot do so. Petitioners did not raise the lawful-conduct point in their motion for directed verdict at the close of the evidence, as required to preserve the issue under Missouri procedure. Their challenge on appeal to the punitive damages awarded to Respondent City of Greenwood, Missouri ("Greenwood") addressed the sufficiency of the evidence as a matter of state law, with only passing references to due process and this Court's punitive-damages precedents. Because petitioners' constitutional claim was not properly presented below, the record on this issue has not been developed, and the state courts did not have an opportunity to address the claim.

Even if the lawful-conduct argument had been preserved, however, it would not be appropriate for review by this Court. Petitioners' actions in

dispatching quarry trucks along the Second Avenue route through Greenwood were lawful only in the sense that an ordinance passed by Greenwood that halted the truck traffic was determined to be impermissible. But neither the compensatory nor the punitive damages in this case were awarded merely because of the truck traffic; they were awarded because of how the trucks drove and the severe impact they had on Greenwood and its citizens. The law of nuisance, in Missouri and elsewhere, has long distinguished between the validity of a defendant's actions or business in the abstract and the defendant's liability for the consequences of its actions in particular circumstances. None of the justifications proffered by petitioners – most of which were not presented to the state courts in any event – establishes that their conduct was lawful or otherwise permissible in the particular context of this case. As a result, this factually-unique case is not an appropriate vehicle for this Court to delineate the boundaries that substantive due process may impose on the award of punitive damages.

Petitioners' compulsory-counterclaim argument in their second Question Presented is based on Federal Rule of Civil Procedure 13(a). Congress has not given this Court jurisdiction to review state-court decisions turning on the application of federal procedural rules. But even if this Court could entertain the issue, this case does not merit the Court's review. Petitioners do not claim that the Missouri Court of Appeals applied the wrong

standard; they simply quarrel with that court's application of what petitioners acknowledge is the correct standard. Moreover, many decisions of this Court recognize that parties may pursue parallel litigation in the federal and state courts, which is precisely what occurred here.

In the more than two years that have passed since Greenwood was awarded damages against petitioners for public nuisance, petitioners have not paid any portion of the judgment. In their final effort to avoid liability, petitioners have not raised a substantial question for review by this Court, nor one that is procedurally appropriate for the Court's consideration. This Court should deny the Petition for a Writ of Certiorari and bring this case to a close.

I. PETITIONERS DID NOT PROPERLY PRESENT THEIR DUE PROCESS ARGUMENT TO THE MISSOURI COURTS.

This Court will review a state-court decision "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981); *see also McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (discussing "reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of a state whose judicial action we are called upon to review"). Where the highest state court

fails to pass on a federal question, this Court assumes that the omission is due to lack of proper presentation, unless the party seeking certiorari can affirmatively demonstrate the contrary. *Webb*, 451 U.S. at 495; *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

A petitioner seeking review of an issue by this Court must comply with state-court procedures in raising the point below. *See In re Lamkin*, 355 U.S. 59, 59 (1957) (denying petition for writ of certiorari where petitioner failed to comply with applicable state procedures below); *Adams*, 520 U.S. at 87-88 (discussing failure to comply with state procedural rules as adequate and independent ground for state court's disregarding of claim); *Webb*, 451 U.S. at 493 (referring to requirement to apprise state court of nature or substance of federal claim "at the time and in the manner required by the state law"). Among other things, a party seeking to raise a constitutional question in the Missouri courts must assert it at the first available opportunity, specifically designate or quote the constitutional provision alleged to have been violated, and preserve the question throughout the litigation. *State ex rel. Thompson v. Roberts*, 264 S.W.2d 314, 317 (Mo. 1954); *Shipley v. Cates*, 200 S.W.3d 529, 534 n.5 (Mo. 2006) (en banc).

The opinion of the Missouri Court of Appeals in this case did not address the lawful-conduct argument raised by petitioners in their first Question Presented in this Court. Petitioners thus have the burden to affirmatively demonstrate that they

properly presented this issue to the Missouri courts. *Webb*, 451 U.S. at 495. Petitioners have not even attempted to comply with this Court's Rule 14.1(g)(i), which requires them to specify when and how they raised the federal question they seek to have reviewed by this Court. The record of this case demonstrates that petitioners could not have complied with Rule 14.1(g)(i) if they had attempted to do so.

A. Petitioners Did Not Identify the Lawful-Conduct Issue as a Ground for Relief in Their Motion for Directed Verdict.

Petitioners' motion for directed verdict at the close of the evidence in this case included only three paragraphs directed to punitive damages.[1] That argument did not refer to the Constitution or any constitutional rights, and all of the cases cited by petitioners were decisions of the Missouri courts applying state law. Aside from the recitation of general principles, the substance of the argument concerning the punitive damages awarded for nuisance consisted of the following:

> "The only nuisance evidence here is that independent trucks use 2nd Avenue and such trucks are not owned or controlled by

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[1] Defendants' Motion for Directed Verdict at the Close of All Evidence with Suggestions in Support, at 8-9 (Mo. Cir. Ct. Mar. 12, 2008).

> Defendants. There is even a Federal Court injunction allowing rock trucks to use 2nd Avenue. . . . There is simply no evidence that Hunt Martin (which didn't even exist when the street repairs were made) or Martin Marietta have acted in a way that would merit a punitive damages award."[2]

B. The Lawful-Conduct Argument in Petitioners' Motion for Judgment Notwithstanding the Verdict Did Not Preserve the Point.

After trial, petitioners filed two motions for judgment notwithstanding the verdict. Those motions were accompanied by two briefs, one of which was devoted to issues of punitive damages.[3] In contrast to the directed-verdict papers, petitioners' brief at this stage of the case identified a constitutionally-based argument similar to the issue they raise in this Court, which was captioned as follows: "II. The Fourteenth Amendment Prohibits Punishment for the Lawful Use of a Public Road Pursuant to Express Authorization To Do So."[4] Although some of the discussion that followed was grounded in state law,

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[2] *Id.* at 9.

[3] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial on Punitive Damages (Mo. Cir. Ct. Apr. 14, 2008) ("JNOV Suggestions").

[4] JNOV Suggestions at 11.

petitioners cited *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and otherwise made clear that the thrust of their argument was constitutional.[5] In addition, petitioners advanced other due process arguments concerning the punitive damages awarded.[6]

As in the federal system, however, a motion for judgment notwithstanding the verdict in Missouri serves as a request "to have judgment entered in accordance with the motion for a directed verdict." Mo. R. Civ. P. 72.01(b). An issue not raised in a motion for directed verdict cannot serve as the basis for a motion for judgment notwithstanding a verdict, nor is such an issue preserved for appeal. *Burrell v. O'Reilly Automotive, Inc.*, 175 S.W.3d 642, 648-49 (Mo. Ct. App. 2005); *Goede v. Aerojet General Corp.*, 143 S.W.3d 14, 18 (Mo. Ct. App. 2004); *see generally Robbins v. Robbins*, 328 S.W.2d 552, 555 (Mo. 1959) (Missouri appellate courts cannot review a matter that is not presented to or expressly decided by the trial court); Mo. Rev. Stat. § 512.160.1. As a result,

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[5] JNOV Suggestions at 12.

[6] Petitioners argued that the punitive damages were unconstitutionally excessive and that the trial court improperly permitted the jury to consider evidence of Martin Marietta's nationwide revenues. JNOV Suggestions at 16-17. Neither of these arguments was renewed on appeal, and neither is before this Court.

petitioners' attempt to assert their lawful-conduct argument after trial was of no consequence.

C. Petitioners' Fleeting References to Due Process Principles in their Challenge on Appeal to the Sufficiency of the Evidence Supporting Punitive Damages Were Insufficient To Preserve the Issue for Review by this Court.

Even if petitioners had preserved the lawful-conduct issue in the trial court, their abandonment of the point on appeal would preclude review by this Court. In the Missouri Court of Appeals, Petitioner Martin Marietta Materials, Inc. ("Martin Marietta") filed a 150-page opening brief of 30,977 words.[7] As mandated by Missouri procedure, that brief specified eleven "Points Relied On," each of which was required to identify the ruling of the trial court that was challenged, state the legal reasons for the claim of reversible error, and explain in summary fashion why, in the context of the case, the legal reasons

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[7] Petitioner Hunt Martin Materials, LLC ("Hunt Martin") filed a separate brief that included one Point Relied On addressed to punitive damages. Brief of Appellant Hunt Martin Materials, Inc., at 10 (Mo. Ct. App. Dec. 1, 2008). Both the point and its supporting argument focused entirely on the proposition that Greenwood had failed to present clear and convincing evidence of Hunt Martin's complete indifference to or conscious disregard for the safety of others. *Id.* at 10, 24-26. Hunt Martin did not cite the Due Process Clause or any cases addressing the issue of lawful conduct and punitive damages.

supported the claim of error. *See* Mo. R. Civ. P. 84.04(d)(1). The only Point Relied On conceivably relevant to the due process claim pressed by petitioners in this Court read as follows:

> "X. The Trial Court Erred in Failing To Grant Appellant's Motions for a Directed Verdict, for JNOV and for a New Trial on the Issue of Punitive Damages and in Submitting the Issue of Punitive Damages to the Jury Because Greenwood Failed To Offer Evidence To Support Punitive Damages in that Greenwood Failed To Present Clear and Convincing Evidence of Appellant's Evil Motive or its Legal Equivalents in Paying Contractors To Make Repairs to Second Avenue or in Making its Quarry Products Available to the Contractors of the Quarry's Customers Who Legally Used the Street Greenwood Had Designated as a Commercial Truck Route for Years."[8]

This Point Relied On did not adequately preserve the lawful-conduct argument. "To properly assert a violation of a constitutional right in a point relied on, an appellant must specifically identify the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself." *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo. 1998) (en banc). When an appellant does not claim a violation of a particular

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[8] Brief of Appellant Martin Marietta Materials, Inc., at 42 (Mo. Ct. App. Dec. 1, 2008) ("Martin Marietta Brief").

constitutional right in its Points Relied On, that issue is not before the appellate court. *State v. Damask*, 936 S.W.2d 565, 570 (Mo. 1996) (en banc) (refusing to consider Fourth Amendment challenge to detention and search where Point Relied On challenged only initial traffic stop); *State v. Shaw*, 847 S.W.2d 768, 773 n.4 (Mo. 1993) (en banc) (First Amendment argument not included in Points Relied On in court of appeals was abandoned); *Pruellage v. De Seaton Corp.*, 380 S.W.2d 403, 405 (Mo. 1964) (constitutional question not included in Points Relied On is considered abandoned and no longer an issue in the case).[9] *See generally Adams*, 520 U.S. at 87-88 & n.1 (noting that failure to identify federal claim in "statement of issues" required by state procedural rules appeared to be adequate and independent ground for this Court's refusal to entertain issue); *Webb*, 451 U.S. at 498 n.4 (remarking that petitioner had not demonstrated that state supreme court's failure to reach federal issue was not based on her failure to cite authority to support enumerated errors, as required by state procedure).

Following its Point Relied On, Martin Marietta was required to list up to four cases, as well as

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[9] Even where non-constitutional issues are involved, the Missouri courts treat arguments "not set out in the point relied on but merely referred to in the argument portion of the brief" as abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. 2002) (en banc); *see also Frager v. Glick*, 347 S.W.2d 385, 390-91 (Mo. 1961).

constitutional provisions, on which it principally relied. *See* Mo. R. Civ. P. 84.04(d)(5). Martin Marietta cited three cases, each of which turned on the sufficiency of evidence supporting punitive damages solely as a matter of *state* law.[10] Martin Marietta did not cite the Due Process Clause there or anywhere else in its brief.

Martin Marietta's argument supporting Point X occupied fifteen pages of its brief. As the point itself suggested, the argument focused on the sufficiency of the evidence of petitioners' evil motive. For example, Martin Marietta identified the standard of review as "clear and convincing evidence that the defendants acted with an evil mind or [its] legal equivalent,"[11] rather than the *de novo* standard applicable to a due process challenge to punitive damages. *See Krysa v. Payne*, 176 S.W.3d 150, 156 (Mo. Ct. App. 2005), citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). Martin Marietta also included two lengthy discussions of *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. 2001) (en banc).[12] In that case, the Supreme Court of Missouri reversed an award of punitive damages because the defendant's actions were consistent with applicable regulations.

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[10] Martin Marietta Brief at 42, citing *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. 2001) (en banc); *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989) (en banc); and *Peters v. General Motors Corp.*, 200 S.W.3d 1 (Mo. Ct. App. 2006).

[11] Martin Marietta Brief at 132.

[12] Martin Marietta Brief at 137-38, 141-42.

See id. at 248-49. But that holding was based on state law; the court held that the defendant's compliance with applicable law defeated the plaintiff's effort to show that the defendant acted with a mental state sufficient to permit the imposition of punitive damages. *See id.* at 249. Martin Marietta also cited a number of other cases, from Missouri and elsewhere, in support of the same and similar propositions.[13]

Martin Marietta used the words "due process" three times in its argument regarding the submissibility of punitive damages, and the phrase also appeared twice in quotations from cases.[14] In addition, *Campbell* was cited twice – in connection with a reference to "the most basic notions of fairness and due process" and for the proposition that a state cannot punish conduct that was lawful where it

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[13] *Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500, 507 (Mo. Ct. App. 1999) (a party who acts in good faith and honestly believes that his act is lawful is not liable for punitive damages under Missouri law); *Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1125-26 (7th Cir. 1975) (reversing permanent injunction against operation of business that complied with zoning and other laws and concluding that "[o]n balance," grounds for punitive damages did not exist); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (under state law, punitive damages are "as a general rule, improper where a defendant has adhered to environmental and safety regulations"); *Booth v. Hanson Aggregates N.Y., Inc.*, 791 N.Y.S.2d 766, 768 (App. Div. 2005) (defendant's continuing operation in reliance on consultant's study and state permit did not constitute "willful or wanton negligence or recklessness").

[14] Martin Marietta Brief at 138, 141, 143.

occurred – and *Gore* once, for the point that a person cannot be punished for what the law plainly allows him to do.[15] After each of these citations, Martin Marietta promptly resumed its discussion of the sufficiency of the evidence under state law. Its stray references to constitutional principles, coming as they did in the midst of an argument based on state law, were not sufficient to preserve the constitutionality of the punitive damage award under the Fourteenth Amendment for this Court's review. "The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams*, 520 U.S. at 88, quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (plurality opinion) (refusing to consider challenge to jury instruction on punitive damages where petitioner "did not squarely argue" in state court that instruction violated due process).

Moreover, the mere use of a phrase that may have constitutional significance does not preserve a constitutional claim. *See Webb*, 451 U.S. at 496 (several references to "full faith and credit" were insufficient to preserve claim under Full Faith and Credit Clause); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78 (1988) (argument characterizing

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[15] Martin Marietta Brief at 138, 141.

punitive damages as an excessive fine was insufficient to preserve claim under Eighth Amendment's Excessive Fines Clause). This principle is particularly applicable where the federal and state constitutions have provisions with similar labels. *See Bankers Life*, 486 U.S. at 78 (noting that Mississippi Constitution also prohibited excessive fines). A bare reference to "due process" involves just such an ambiguity. *Compare* U.S. Const. amend. XIV, § 1 *with* Mo. Const. art. I, § 10.

The conclusion of the argument supporting Martin Marietta's Point X exemplifies its failure to preserve the lawful-conduct issue that it asks this Court to review. Following one of its discussions of state-law cases on the sufficiency of the evidence to support punitive damages, Martin Marietta argued that the award of punitive damages in this case "fundamentally by-passes the necessity of showing an evil mind by clear and convincing evidence and thus violates due process guarantees."[16] This assertion betrays a lack of preservation of petitioners' first Question Presented and, in fact, is a *non sequitur*, for the Due Process Clause does not require such a showing. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (rejecting argument that preponderance standard is unconstitutional).

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[16] Martin Marietta Brief at 143.

Viewed generously, Martin Marietta's presentation to the Missouri Court of Appeals included a "vague appeal to constitutional principles," which does not preserve an argument for review by this Court. *Bankers Life*, 486 U.S. at 77. And, as noted, Hunt Martin did not even mention the Constitution or any of its provisions. In the circumstances of this case, "it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it." *Adams*, 520 U.S. at 89.[17] Accordingly, even if petitioners had not waived their lawful-conduct argument by failing to raise it in their motion for directed verdict, their abandonment of the point on appeal should preclude this Court from entertaining the issue on certiorari.

II. PETITIONERS HAVE NOT DEMONSTRATED COMPELLING REASONS JUSTIFYING THIS COURT'S CONSIDERATION OF THEIR LAWFUL-CONDUCT ARGUMENT.

Petitioners' formulation of their first Question Presented to this Court inappropriately conflates the proceedings held in Missouri state court with those held in federal district court. Petitioners then confuse

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[17] Indeed, Greenwood did not understand that an argument under the Due Process Clause was at issue in petitioners' appeal. Greenwood did not address due process issues in its responsive brief, nor did petitioners in their reply briefs. And, of course, the Missouri Court of Appeals did not discuss the issue.

the issues in the two cases, which are, in significant respects, distinct and independent. The result, suggest petitioners, is a state court's punishment of "conduct that a federal district court held to be lawful under a valid and enforceable contract and constitutionally protected by the Commerce Clause" (Pet. i).

In reality, the proceedings in the parallel litigation between these parties were both more straightforward and more complex than petitioners have made them appear. This litigation in state court involved the common-law tort of public nuisance. As the Missouri Court of Appeals stated, such a nuisance "is an offense against the public order and economy of the state and violates the public's right to life, health, and the use of property, while, 'at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.'" *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 616 (Mo. Ct. App. 2009), quoting *City of St. Louis v. Varahi, Inc.*, 39 S.W.3d 531, 535 (Mo. Ct. App. 2001) (Pet. 10a). Trial in this case was conducted in March 2008.

The proceedings in federal court involved two relevant claims. First, petitioners contended that a contract executed in 1991 required Greenwood in good faith to continue to designate the Second Avenue route through the city as available for commercial use. This agreement is not part of the "undisputed history of the parties' conduct and the relations

between the parties," as petitioners suggest (Pet. 14). In fact, Greenwood raised substantial questions as to its enforceability, the interpretation of ambiguous language within it, and whether Greenwood acted in good faith in closing the road to through commercial traffic. The federal judge resolved these issues in favor of petitioners at a bench trial, despite Greenwood's argument that the latter two issues were matters for the jury to decide (Pet. 50a, 52a).

Petitioners also claimed that Greenwood's restriction of commercial traffic on Second Avenue violated the Commerce Clause, on the theory that the burden of the city's ordinance upon interstate commerce was clearly excessive in comparison to its local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This issue also was adjudicated by the federal judge in favor of petitioners (Pet. 59a), over Greenwood's objection that it was a claim at law because petitioners sought damages under 42 U.S.C. § 1983. The trial in federal court was conducted in June and July 2008, and only the amount of damages was determined by the jury. The district court's decision on the matters decided by the court was entered in September 2008 (Pet. 46a).

As petitioners acknowledge, Greenwood has appealed the judgment of the district court to the United States Court of Appeals for the Eighth Circuit. The issues in that appeal include Greenwood's Seventh Amendment right to a jury trial, the validity of the 1991 contract, the district court's determination of the Commerce Clause claim, petitioners'

failure to establish a nexus between interstate commerce and the damages they sought, and the district court's refusal to prohibit relitigation of issues previously determined adversely to petitioners on the nuisance claim in state court. The Eighth Circuit heard oral argument and took Greenwood's appeal under submission on September 21, 2009.

A. The Decision of the Missouri Court of Appeals Is Not Inconsistent with This Court's Precedents, Because Petitioners Have Not Been Punished on Account of Lawful Conduct.

Petitioners do not seek this Court's review on the basis that the federal courts of appeals and state courts of last resort are in disagreement on the lawful-conduct question raised by petitioners. Rather, petitioners argue that the Missouri courts' handling of the punitive damages in this case is inconsistent with this Court's precedents (Pet. 13). The record in this case, along with common-law and common-sense principles, demonstrates that petitioners are incorrect.

1. Petitioners Were Not Required To Pay Punitive Damages Merely Because Trucks Used Second Avenue.

Throughout their petition, petitioners characterize the parallel state and federal cases as fundamentally irreconcilable, because the behavior

punished in state court was "the very conduct" that the federal district court concluded was "plainly allowed" (Pet. 14, 16). The record does not support this assertion.

Petitioners commenced the federal litigation because of Greenwood's passage of an ordinance that effectively precluded them from dispatching vehicles from their quarry, located south of Greenwood, along Second Avenue to points north of Greenwood.[18] The district court invalidated the ordinance, and the federal-court jury awarded petitioners more than $468,000 in damages for Greenwood's supposed breach of the 1991 contract and violation of the Commerce Clause. The district court also enjoined Greenwood "from taking any action that has the effect of prohibiting all through-truck traffic through the City" (Pet. 60a).

The "very conduct" validated by the federal court, therefore, was the driving of trucks along Second Avenue or another north-south route that might be offered by Greenwood as an alternative. If the Missouri state courts had authorized the punishment

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[18] Perhaps in an effort to overstate the interstate-commerce aspects of their claim, petitioners suggest that their goal is to reach Interstate Highways 35 and 435 (Pet. 3). But these highways, which are located many miles from Greenwood, were not the subject of evidence or argument in either state court or federal court. The undisputed evidence is that petitioners' primary market is the city of Lee's Summit, Missouri, which is immediately north of Greenwood, and the main point of interest is the intersection of Missouri State Highways 150 and 291.

of petitioners solely for this particular conduct, petitioners might well have a valid complaint about their treatment – one that they should have raised in the state courts in the first instance, of course.

But petitioners were not punished merely for the existence of the traffic they set in motion. In fact, they were not even found liable for *compensatory* damages on that basis. In the Missouri Court of Appeals, petitioners argued that "traffic alone cannot constitute a nuisance" (Pet. 12a). The court acknowledged that this was a correct principle of law, but not an applicable one, because the issue in this case was "whether the trucks' use of Second Avenue was reasonable" (Pet. 13a). Recognizing that Greenwood complained not merely of the existence of traffic, but also of "the effect of large trucks transporting crushed rock at times through a residential area at the rate of every one to two minutes," the Missouri Court of Appeals concluded that Greenwood had adequately proved its claim for public nuisance (*id.*).

2. Conduct That Is Lawful in General May Be Wrongful in a Particular Circumstance or Context.

The law makes a significant distinction between the legality of an act in the abstract and the actor's potential liability for the manner in which that act is performed, or the consequences the act may have for others. For example, one may not "insist upon a street meeting in the middle of Times Square at the

rush hour as a form of freedom of speech or assembly." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Conspirators may be punished for pursuing "some purpose not in itself criminal or unlawful by criminal or unlawful means." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921); *see also Ritterbusch v. Holt*, 789 S.W.2d 491, 494 (Mo. 1990) (en banc) (civil conspiracy may involve use of "unlawful means to do an act which is lawful"). Similarly, a defendant may be liable under the theory of *prima facie* tort for engaging in "an intentional lawful act" with intent to injure another. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993) (en banc).

The distinction between the general legality of an act and the actor's liability for damages is particularly meaningful in a case involving a nuisance. As this Court stated in its seminal decision upholding zoning regulations,

> "the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (citation omitted).

Missouri nuisance law recognizes the same distinction. *See, e.g., Looney v. Hindman*, 649 S.W.2d 207, 213 (Mo. 1983) (en banc) ("The term 'nuisance' connotes the use of one's property in a manner which is not abstractly unlawful but which, in the circumstances, demonstrates an unreasonable interference with the rights of neighboring property owners."); *Edmonson v. City of Moberly*, 11 S.W. 990 (Mo. 1889) (city's legal authority to establish sewer system did not permit city to exercise power in such a manner as to create a nuisance); *Streett v. Marshall*, 291 S.W. 494, 499 (Mo. 1927) (en banc) (funeral home that was "not only lawful but indispensable" yet located in a residential neighborhood was a nuisance as a matter of law); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784, 795 (Mo. 1970) (affirming award of compensatory and punitive damages for nuisance despite defendant's argument "that its business was lawful"); *Hawkins v. Burlington Northern, Inc.*, 514 S.W.2d 593, 598-99 (Mo. 1974) (en banc) (rejecting defendant's argument that statute with which it claimed to have complied supplanted common law of nuisance).[19]

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[19] *See generally* Restatement (Second) of Torts § 831 cmt. b (1979) ("There are suitable and unsuitable places for carrying on all lawful activities and sound public policy demands that people carry them on in suitable places so as to avoid as much of the conflict between incompatible interests as possible."); *Ileto v. Glock Inc.*, 349 F.3d 1191, 1214 (9th Cir. 2003) ("[T]he fact that a certain occupation or business can be performed in a legal manner does not prevent that occupation or business from becoming a nuisance when the occupation or business is

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3. Petitioners Are Not Immune from Punishment for Creating a Public Nuisance.

Petitioners cite three bases for their assertion that the conduct for which punitive damages were imposed was lawful: the 1991 contract, the Commerce Clause, and Greenwood's designation of Second Avenue as a commercial-use route before June 2006 (Pet. 14-22).[20] Each of these three arguments suffers from the general flaw discussed above – *i.e.*, each authorized, at most, the mere presence of trucks on Second Avenue, and not their deleterious impact on Greenwood and its residents – but each is problematic for other reasons as well.

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performed in a manner that unreasonably infringes on a public right."); *Storey v. Central Hide & Rendering Co.*, 226 S.W.2d 615, 617 (Tex. 1950) (a lawful business may become a nuisance when it is operated in a place or manner as to seriously interfere with the enjoyment of life and property); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143 n.4 (Ohio 2002) (a qualified nuisance involves a lawful act negligently or carelessly done); *Grundy v. Thurston County*, 117 P.3d 1089, 1092 n.5 (Wash. 2005) (a lawful action may still be a nuisance); *City of Atlanta v. Kleber*, 677 S.E.2d 134, 135 n.1 (Ga. 2009) (the fact that an act is otherwise lawful does not prevent it from being a nuisance).

[20] Petitioners also argue that they had a reasonable belief that their conduct was lawful or otherwise protected (Pet. 15, 16). Assuming for the sake of argument that petitioners presented evidence to support this contention and argued the issue before the jury, the verdict in this case demonstrates clearly that the jury did not find it persuasive. The Due Process Clause does not require or permit a reviewing court to credit a defendant's self-serving testimony that it acted in good faith when the factfinder has determined otherwise.

Although petitioners identified the 1991 contract in an affirmative defense in their answer in this state-court case, they made no effort to pursue that defense. They did not move to dismiss the case or seek summary judgment on the basis of the contract; they did not offer the contract into evidence at trial; and they did not request that the jury be instructed on their contractual defense. Petitioners apparently chose to proceed in this fashion because they were justifiably concerned that the state courts might rule that the contract was unenforceable. But whatever the reason for petitioners' choice not to present the contract to the state court for consideration, they cannot now complain of constitutional error by a court that was never presented with either evidence or argument in support of what petitioners now claim to have been their rights.

Petitioners' argument based on the Commerce Clause is similarly flawed. Several months after the jury awarded punitive damages to Greenwood in state court, the federal district court held that Greenwood's ordinance barring through-truck traffic violated the Commerce Clause (Pet. 59a-60a). But petitioners did not rely on the Commerce Clause at trial in state court as justification for their actions, and they did not assert the Commerce Clause as a ground for relief on appeal. In any event, the federal court's interpretation of the Commerce Clause protected petitioners only against claims that they violated Greenwood's ordinance by dispatching trucks along Second Avenue. The district court ruled that

petitioners' trucks must be permitted to use the road, not that they must be permitted to pollute, to spew dust throughout the neighborhood, to require residents and businesses to keep their windows closed because of the noise, or to force children out of their front yards and off their bicycles. *See City of Greenwood*, 299 S.W.3d at 613 (Pet. 4a).

Although petitioners' argument regarding Greenwood's identification of Second Avenue as a route for commercial traffic prior to 2006 is not fundamentally different from its arguments regarding the 1991 contract and the Commerce Clause, petitioners phrase the argument in terms of fair notice rather than substance (Pet. 19). That distinction does not make a difference. As with the 1991 contract and the Commerce Clause, Greenwood's pre-2006 ordinance simply authorized commercial vehicles to use Second Avenue for through traffic; it did not permit those vehicles to operate in any manner petitioners deemed appropriate, without regard to the consequences.

As for the issue of fair notice, due process "is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *TXO*, 509 U.S. at 466. More than a century of Missouri precedent advised petitioners that they could be liable for punitive damages for maintaining a nuisance willfully or with reckless indifference to the rights of others. *See, e.g.*, *Paddock v. Somes*, 51 Mo. App. 320, 325 (1892); *Krebs v. Bambrick Bros. Constr. Co.*, 129 S.W. 425 (Mo. Ct. App. 1910); *Schumacher v. Shawhan Distillery Co.*,

165 S.W. 1142, 1144 (Mo. Ct. App. 1914); *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752, 756-58 (Mo. 1968); *Hawkins*, 514 S.W.2d at 603; *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 793 (Mo. 1980) (en banc); *Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218, 222 (Mo. Ct. App. 1985).

B. In the Context of a Nuisance Action, Petitioners' Lawful-Conduct Argument Does Not Present an Important Question of Federal Law Meriting This Court's Review.

Petitioners suggest that "*no* award of punitive damages is constitutionally permissible" in certain cases or circumstances (Pet. 11). Assuming that this proposition has some merit in the abstract, this fact-bound case is not an appropriate vehicle for the delineation of its boundaries. As discussed above, nuisance law requires the balancing of the rights of the respective parties, often in situations in which a defendant's activities are lawful in general but unreasonable, and thus tortious, in their specifics. Despite petitioners' efforts to paint the scene in starkly contrasting hues – the federal court held that their conduct was lawful, while the state court punished them for engaging in it – the reality of this case, like many nuisance cases, is far more nuanced. And the Missouri courts were not provided an opportunity to weigh in on the constitutional question now pressed by petitioners.

If this Court is inclined to consider whether substantive due process categorically bars punitive damages where lawful conduct is at issue, it should grant certiorari in a case with a fully-developed record and no room for dispute that the defendant's actions were authorized in the specific respects that gave rise to the plaintiff's claims. Because this is not such a case, the petition should be denied.

III. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW A STATE COURT'S APPLICATION OF A FEDERAL RULE OF CIVIL PROCEDURE.

This Court's jurisdiction to review state-court judgments is limited, in relevant part, to cases "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a). The compulsory-counterclaim issue raised by petitioners involves no such title, right, privilege, or immunity. Rather, petitioners' second Question Presented argues that the Missouri courts misapplied Federal Rule of Civil Procedure 13(a), which governs compulsory counterclaims in civil actions in the federal courts.

This Court's certiorari jurisdiction is governed by statute. U.S. Const. art. III, § 2; *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810). Section 1257(a) affirmatively authorizes this Court to review state-court decisions in which parties claim rights or

immunities under certain bodies of federal law, but these do not include federal procedural rules. Congress' affirmative description of this Court's jurisdiction "has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." *Durousseau*, 10 U.S. at 314. Accordingly, even if this were a case that otherwise called out for this Court's intervention – which it is not, for the reasons explained below – the Court would not have the power to address the Missouri courts' application of Rule 13(a).

IV. PETITIONERS' DISAGREEMENT WITH THE MISSOURI COURT'S APPLICATION OF RULE 13(a) TO ALLEGED COMPULSORY COUNTERCLAIMS PRIOR TO JUDGMENT IS NOT AN IMPORTANT FEDERAL QUESTION REQUIRING A RESOLUTION BY THIS COURT.

In connection with their second Question Presented, petitioners suggest that the courts have applied four different tests to determine whether a counterclaim is compulsory for purposes of Rule 13(a) (Pet. 25). They also cite a law-review article in which the author criticizes these four tests and proposes more than 20 alternatives. *See* Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 729-30 & n.160 (2007). Nevertheless, petitioners argued below that the "logical relationship" test was the appropriate one (Pet. 28a), and the Missouri Court of

Appeals agreed (Pet. 28a-29a). Petitioners cannot and do not suggest now that the Court of Appeals should have applied a different test; rather, they complain that the "Missouri Court of Appeals *misapplied* the logical relationship test" (Pet. 27) (emphasis added). This Court rarely grants certiorari to address "the misapplication of a properly stated rule of law." S. Ct. R. 10. Even aside from the jurisdictional problem addressed above, this is not the rare case in which this Court should depart from its ordinary practice.

It is important to understand what is and is not at issue in this case. This is not, for example, a situation in which related actions were filed and pending simultaneously in two different federal judicial districts. *Cf. Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1263 (7th Cir. 1977) (discussing one court's power to enjoin prosecution of claims in another). Nor does this case involve a party's failure to assert claims until after a final judgment on related matters in federal court. *Cf. Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1078-79 (5th Cir. 1984); *Polymer Indus. Products Co. v. Bridgestone/Firestone, Inc.*, 347 F.3d 935, 935-36 (Fed. Cir. 2003); *Central W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App'x 415, 429 (6th Cir. 2007). In those situations, Rule 13(a) is directly applicable and permits the federal courts to ensure the orderly presentation of claims. In the latter situation, principles of claim preclusion and issue preclusion also are implicated. *See generally Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008).

This dispute, by contrast, involves parallel actions in federal and state court, in which each of the respective defendants asserted no counterclaims. Petitioners' position appears to be that once they commenced litigation in federal court, Greenwood could not assert related claims against them in state court, even prior to the entry of judgment on petitioners' federal claims. But this Court has long recognized that parallel litigation in federal and state court is permissible. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292-93 (2005) (holding that preclusion law, not *Rooker-Feldman* doctrine, governs disposition of federal litigation when parallel state litigation reaches judgment first); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524-25 (1986) ("[S]imultaneous litigation in state and federal courts on the same issue . . . is one of the costs of our dual court system."); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970) ("[T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) ("Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court."); *McClellan v. Carland*, 217 U.S. 268, 282 (1910) ("[T]he pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies.").

Petitioners' selective and out-of-context recitation of snippets of Greenwood's filings in the two cases cannot transform the Rule 13(a) question into one worthy of this Court's review, even if certiorari were jurisdictionally available. Many of the statements cited by petitioners, for example, were made before Greenwood amended its state-court petition to include the nuisance claim. Prior to that amendment, which occurred several months after this case was removed and remanded, Greenwood had asserted only two claims: one for a declaratory judgment as to the validity of its ordinance under state law and one for petitioners' negligent repair of Second Avenue.[21]

After the nuisance claim was asserted in this case, the factual interrelatedness between the two cases increased, as petitioners acknowledge (Pet. 7). Despite the change in circumstances, the federal court concluded that Greenwood was judicially estopped from invoking the doctrine of issue preclusion following the state court's nuisance judgment (Pet. 49a). Greenwood disagrees with that ruling of the district court and has pressed the issue on appeal to the Eighth Circuit.[22] But that dispute has no

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[21] First Amended Petition for Declaratory Judgment and Other Relief (Mo. Cir. Ct. Feb. 1, 2007); Plaintiff's Motion for Leave to Amend the Petition (Mo. Cir. Ct. Oct. 2, 2007).

[22] Although petitioners now claim that the "facts and evidence that Greenwood relied upon in attempting to defend against Petitioners' Commerce Clause claim in federal court were the same facts and evidence that formed the basis of Greenwood's nuisance claims in state court" (Pet. 29), they have

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bearing on the substantiality of the compulsory-counterclaim issue raised in this Court by petitioners.

In sum, this case involves parallel litigation in federal and state courts, and the state court entered judgment first. Petitioners do not claim that the Missouri Court of Appeals applied the wrong standard in its discussion of Rule 13(a); they simply disagree with the court's application of that standard. Even if this Court had jurisdiction to review a state court's application of a federal procedural rule, it should decline to do so in this case.

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taken a different position before the Eighth Circuit. In response to Greenwood's argument that the district court should have precluded petitioners from relitigating the issues decided in Greenwood's favor on the nuisance claim, petitioners argued that issue preclusion was inappropriate because the two cases did not involve the same issues. Appellees' Response Brief, No. 08-3983, at 67-68 (8th Cir. May 19, 2009).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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